83-1215

Office - Supreme Court, U.S.
FILED
JAN 23 1984
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1983

No. _____

STATE OF SOUTH CAROLINA, et al.,

Petitioners,

v.

JOHN R. BLOCK, SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DONALD M. BARNES
COUNSEL OF RECORD
SALVATORE A. ROMANO
JOYCE L. BARTOO

ARENT, FOX, KINTNER PLOTKIN & KAHN
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 857-6000

Counsel for Petitioner Associated Milk Producers, Inc.

D. PAUL ALAGIA, JR.
RICHARD A. GLADSTONE
COUNSEL OF RECORD
SYDNEY J. BUTLER

BARNETT & ALAGIA
1000 Thomas Jefferson St., N.W.
Washington D.C. 20007
(202) 342-0342

Counsel for Petitioners Suncoast Milk Producers Cooperative, Inc. et. al.

Additional Counsel Listed on Inside Cover

T. TRAVIS MEDLOCK
Attorney General
CLIFFORD O. KOON, JR.
Assistant Attorney General
JOSEPH A. WILSON II
Chief Deputy Attorney General
COUNSEL OF RECORD
State of South Carolina
Rembert Dennis Bldg., Rm. 642
1000 Assembly St.
Columbia, South Carolina 29211
(803) 758-2072

RAYMON E.
LARK, JR.
Assistant
Consumer Advocate
COUNSEL OF RECORD
2801 Divine St.
P.O. Box 5757
Columbia, S.C.
29205
(803) 758-5011

Counsel for
Petitioner South
Carolina
Department of
Consumer Affairs

RUSSELL W. TEMPLETON
COUNSEL OF RECORD
1 Monckton Blvd.
Columbia, S.C. 29206
(803) 782-0235

Counsel for Petitioners South
Carolina
Farm Bureau
and Frank Flowers,
W. Charles McGinnis
and Lawrence
Weathers

QUESTIONS PRESENTED

Section 201 of the Agricultural Act of 1949, as amended by the Omnibus Budget Reconciliation Act of 1982, granted the Secretary of Agriculture the authority to impose two 50-cent per hundredweight deductions from the pay prices received by dairy farmers for all milk commercially marketed throughout the United States. The Secretary implemented a deduction program which involved taking hundreds of millions of dollars from dairy farmers. The Fourth Circuit's nonsubstantive review of the regulatory process employed by the Secretary to implement the deduction program conflicts with the decisions of this Court and frustrates the Congressional intent of the dairy price support statutes. The questions are:

1. Whether the Secretary's decision to implement the deduction program was arbitrary and capricious under the Administrative Procedure Act, as given definition by the Regulatory Flexibility Act, because of the failure to consider important and relevant factors such as whether the program would decrease dairy production and would force dairy farmers out of business.

2. Whether the Secretary's decision to implement the deduction program is inconsistent with the authorizing dairy price support legislation because of the failure to consider factors prerequisite to achieving the overall purpose of that legislation and the policies and factors specifically articulated by Congress in that legislative framework.

LIST OF PARTIES

Pursuant to Rule 21.1(b), Rules of the Supreme Court, counsel for petitioners certify that the following is a complete list of all parties to the proceeding below:

1. State of South Carolina
2. Leslie E. Tindal, as Commissioner of Agriculture for the State of South Carolina
3. Steven W. Hamm, as South Carolina Consumer Advocate
4. South Carolina Farm Bureau
5. Frank Flowers
6. W. Charles McGinnis
7. Lawrence Weathers
8. Suncoast Milk Producers Cooperative, Inc.
9. Independent Dairy Farmers Association

10. Tampa Independent Dairy Farmers' Association, Inc.

11. Upper Florida Milk Producers Association

12. Georgia Milk Producers, Inc.

13. Coble Dairy Products Cooperative, Inc.

14. Inter-State Milk Producers Cooperative

15. Dairymen, Inc.

16. Associated Milk Producers, Inc.

17. John R. Block, Secretary of the United States Department of Agriculture

18. United States Department of Agriculture

19. Commodity Credit Corporation

Petitioners have no parent companies, subsidiaries (except wholly-owned subsidiaries) or affiliates.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	iii
Table of Contents	v
Table of Authorities	viii
Opinions Below	2
Jurisdiction	2
Statutory Provisions Involved	3
Statement of the Case	3
A. Background	3
B. The District Court's Decision	14
C. The Decision of the Court of Appeals	17
Reasons for Granting the Petition	23
I. The Fourth Circuit's Holding That An Agency Need Consider Only Those Factors Specifically Spelled Out By The Enabling Statute Conflicts With The Decisions Of This Court And Other Circuits And Amounts To Judicial Repeal Of The Administrative Procedure Act	23

II. The Fourth Circuit's Holding Frustrates The Long-Standing Congressional Policies And Intent Underlying The Dairy Price Support Legislation 38

Conclusion 52

Appendix A 1a

Opinion of the United States Court of Appeals for the Fourth Circuit (September 9, 1983) 1a

Preliminary Injunction of the United States District Court for the District of South Carolina (June 3, 1983) 67a

Memorandum Opinion and Order of the United States District Court for the District of South Carolina (June 3, 1983) 71a

Order of the United States Court of Appeals for the Fourth Circuit (May 13, 1983) 307a

Order of the United States Court of Appeals for the Fourth Circuit (June 13, 1983) 309a

Order of the United States Court of Appeals for the Fourth Circuit (October 25, 1983) 312a

Appendix B 315a

7 U.S.C. § 1446b (§ 204 of the Agricultural Act of 1949) 315a

Omnibus Budget Reconciliation Act of 1982 .....316a

7 U.S.C. § 1446 (§ 201 of the Agricultural Act of 1949) (as amended by the Omnibus Budget Reconciliation Act of 1982) 326a

5 U.S.C. § 553, Administrative Procedure Act 335a

5 U.S.C. § 706, Administrative Procedure Act 338a

5 U.S.C. § 603, Regulatory Flexibility Act 340a

5 U.S.C. § 604, Regulatory Flexibility Act 343a

TABLE OF AUTHORITIES

Page

CASES

Appalachian Power Co. v. Environmental Protection Agency, 477 F.2d 495 (4th Cir. 1973) 26

Baltimore Gas & Electric Co. v. NRDC, Inc., ___U.S.___, 103 S.Ct. 2246 (1983) ... 26

Barlow v. Collins, 397 U.S. 159 (1970) 49

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 25,26,27,28

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 23

Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1974) 43

FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27 (1981) 42

McCulloch Gas Processing Corp. v. Department of Energy, 650 F.2d 1216 (T.E.Ct.App. 1981) 32

Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co., ___U.S.___ 103 S.Ct. 2856 (1983) 26,27,28

National Cable Television v. U.S., 415 U.S. 336 (1974) 23

Page

Pennzoil Co. v. Federal Power Comm., 534 F.2d 627 (5th Cir. 1976) 32

Radzanower v. Touche Ross & Co., 426 U.S. 148 (1976) 41,47

Small Refiner Lead Phase-Down Task Force v. United States Environmental Protection Agency, 705 F.2d 506 (D.C. Cir. 1983) 34

State of South Carolina ex rel. Patrick v. Block, 558 F.Supp. 1004 (D.S.C. 1983) ... 7

State of South Carolina ex rel. Tindal v. Block, 717 F.2d 874 (4th Cir. 1983) . passim

Udall v. Tallman, 380 U.S. 1 (1965) 42

United States v. Borden, 308 U.S. 188(1939) 41

United States v. Menasche, 348 U.S. 528 (1955) 51

United States v. Welden, 377 U.S. 95(1964). 41

Vermont Yankee Nuclear Power Corp. v. NRDC, Inc., 435 U.S. 519 (1978) 26

Weinberger v. Hynson, Wescott & Dunning, Inc., 412 U.S. 609 (1973) 41,51

STATUTES & LEGISLATIVE MATERIAL

Administrative Procedure Act ..... passim
5 U.S.C. § 553 ..... 3, 16
5 U.S.C. § 706(2) 3,15,27

Page

Agricultural Act of 1949:
7 U.S.C. § 1446(c);
(Subsection 201(c)) ..... passim
7 U.S.C. § 1446(d);
(Subsection 201(d)) ..... passim
7 U.S.C. § 1446(d)(1) 5
7 U.S.C. § 1446(d)(1)(A) 45
7 U.S.C. § 1446(d)(1)(B) 45
7 U.S.C. § 1446(d)(1)(C) 46
7 U.S.C. § 1446(d)(2) .. 6,20,25,37,38,39,40
7 U.S.C. § 1446(d)(3) 6,48
7 U.S.C. § 1446b;
(Section 204) ... 3,8,19,21,22,39,40,42,43

Omnibus Budget Reconciliation Act of 1982. (Pub.L.No. 97-253, 96 Stat. 763) ... 5,8

Regulatory Flexibility Act:
5 U.S.C. §§ 601, 603, 604 3,4,33,34,35,52

S. Rep. No. 96-878, 96th Cong., 2d Sess. 9 (1980) 34

H. Rep. No. 97-687, 97th Cong., 47 Fed. Reg. 42128-29 (1982) 2d Sess. 11 (1982) ... 36

128 Cong. Rec. S.9891, (daily ed. Aug. 5, 1982) (Statement of Sen. Cochran) 97th Cong. 2d Sess. 46

Page

OTHER AUTHORITIES

47 Fed. Reg. 42128-29 (1982) 6

48 Fed. Reg. 3764-67, 3786 (1983) 8,22,30,35,43

48 Fed. Reg. 11253-55 (1983) .. 13,22,32,37,43

48 Fed. Reg. 24085-88 (1983) 22,29,30,43

DeLong, Informal Rulemaking and the Integration of Law and Policy, 65 Va.L.Rev. 257 (1979) 26

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. _____

STATE OF SOUTH CAROLINA, et al.,

Petitioners,

v.

JOHN R. BLOCK,
SECRETARY OF THE UNITED STATES
DEPARTMENT OF AGRICULTURE, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to the United States Court of Appeals for the Fourth Circuit to review that court's judgment entered

in this matter on September 9, 1983.

OPINIONS BELOW

The opinion of the court of appeals, reported at 717 F.2d 874, appears in the Appendix (hereinafter "A") hereto at 1a. The opinion of the United States District Court for the District of South Carolina, not officially reported, appears in the Appendix hereto at 71a.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1983. A petition for rehearing and a suggestion for rehearing en banc were denied on October 25, 1983. A. 312a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Agricultural Act of 1949, as amended -- § 201 (7 U.S.C. §§ 1446(c) and (d)) § 204 (7 U.S.C. § 1446b) -- are set forth in Appendix B.

The relevant provisions of the Administrative Procedure Act, 5 U.S.C. §§ 553 and 706(2), and the Regulatory Flexibility Act, 5 U.S.C. §§ 603 and 604, are set forth in Appendix B.

STATEMENT OF THE CASE

A. Background

This case concerns the discretionary authority of the Secretary of Agriculture to impose upon the nation's dairy farmers a deduction from their pay prices totalling hundreds of millions of dollars in disregard of the relevant considerations of impact required by the

Administrative Procedure Act, the Regulatory Flexibility Act and long-established dairy price support legislation.

This suit for declaratory and injunctive relief was instituted by the State of South Carolina and several dairy farmers, against John R. Block, Secretary of Agriculture, the United States Department of Agriculture and the Commodity Credit Corporation. Nine agricultural cooperatives and one trade association, representing thousands of dairy farmers located throughout the Southeast, Mid-Atlantic and Midwest sections of the United States, intervened as plaintiffs.[1/] The suit sought to enjoin

---

1/ The intervenors were: Dairymen, Inc.; Suncoast Milk Producers Cooperative, Inc.; Independent Dairy Farmers Association, Inc.; Tampa Independent Dairy Farmers' Association; Upper Florida Milk Producers Association;
FOOTNOTE CONT'D ON NEXT PAGE

implementation of a 50-cent per hundredweight assessment on dairy farmers on all milk marketed commercially in the United States.

Section 101 of the Omnibus Budget Reconciliation Act of 1982 amended the dairy price support provisions of the Agricultural Act of 1949 in three respects: (1) it established a minimum price support level of $13.10 per hundredweight during the period October 1, 1982 until September 30, 1984 and also set a comparable percentage of parity level for the 1984 fiscal year, 7 U.S.C. § 1446(d)(1); (2) it delegated to the Secretary of Agriculture the discretionary authority to impose a 50-cent per

---

FOOTNOTE CONT'D FROM PREV PAGE.
Georgia Milk Producers, Inc.; Coble Dairy Products Cooperative, Inc.; Inter-State Milk Producers Cooperative; and Associated Milk Producers, Inc.

hundredweight deduction on all milk commercially marketed in the United States ("first 50-cent deduction"), 7 U.S.C. § 1446(d)(2); and (3) it delegated to the Secretary the discretionary authority to impose a second 50-cent deduction on all milk commercially marketed in the United States that would be refundable to the dairy farmers who reduced commercial marketings ("second 50-cent deduction"), 7 U.S.C. § 1446(d)(3).

Disclaiming any need to comply with the notice and comment requirements of the Administrative Procedure Act and the Regulatory Flexibility Act, on September 24, 1982, the Secretary implemented regulations which announced that the dairy price support would be maintained at the minimum level and imposed the first 50-cent deduction. 47 Fed. Reg. 42128-29.

On January 10, 1983, the Secretary's effort to impose the deduction on dairy farmers was preliminarily enjoined by the United States District Court for the District of South Carolina.2/

Less than two weeks later, on January 21, 1983, the Secretary of Agriculture issued a press release stating his intent to implement, effective April 1, 1983, the two 50-cent deductions. On January 27, 1983, the Secretary published a Notice of Proposed Determination to

---

2/ In a thorough and well-reasoned opinion, the district court found "egregious" violations and predicated injunctive relief on the bases that the Secretary failed to comply with the notice and comment procedures required by the Administrative Procedure Act and that the Secretary had misinterpreted the statute -- subsection 201(d) -- as mandating imposition of the assessments rather than as a discretionary grant of authority. State of South Carolina ex rel. Patrick v. Block, 558 F. Supp. 1004 (D.S.C. 1983). This decision was not appealed.

impose the two deductions and provided for the minimum 30 day public comment period. 48 Fed. Reg. 3764-67. The Notice specifically referred to Section 201 -- subsections 201(c)[3/] and (d) (7 U.S.C. § 1446(c) and (d)) -- and Section 204 of the Agricultural Act (7 U.S.C. § 1446b) as establishing the standards and authority for the proposed action. The Notice specifically noted that neither of the two deductions would have a great downward effect upon milk production. 48 Fed. Reg. at 3765.

Thousands of comments were filed which documented the impact of the proposed deduction program upon dairy farm-

---

3/ Subsection 201(c), 7 U.S.C. § 1446(c), was reenacted as part of the 1982 Omnibus Budget Reconciliation Act and establishes the criteria to be followed by the Secretary in implementing any price support or related determinations.

ers and the inability of the program to reduce surplus production or balance production with demand. Virtually all of the comments opposed the proposed program and approximately one-third of the comments recommended alternative proposals for reducing surplus production.

A number of detailed comments highlighted the inadequacy of the analyses and data in the Notice and emphasized the necessity for conducting analyses as a precondition to any workable and reasoned program. These comments urged the Secretary to analyze: (1) the impact of the deduction program in putting farmers out of business, some observing that many young farmers would be the earliest and most severely impacted; (2) the severe impact of the deduction program (potentially billions of dollars) on the rural

economy dependent on dairy farmers; and (3) the impact of the program on decreasing production, noting that the plan, as implemented, would force many dairy farmers to increase production. Other comments emphasized that the inadequacy of the data and analyses set forth in the Notice made it virtually impossible to adequately comment on how the program would impact dairy farmers and the rural economy.

Only a three-page summary of these comments was provided to the Secretary. Although the summary noted that a number of detailed comments focused precisely on the inadequacy of the Regulatory Impact Analysis because it failed to analyze the impact of the assessment on individual dairy farmers, states or regions, it noted that no such analyses were or would

be conducted. Thus, thousands of comments were reduced to an eight-line summary and perfunctory dismissal, an action which the district court subsequently held degraded the comment procedure "from a process integral to reasoned decision-making to empty charade." A. 236a.

On March 16, 1983, the Secretary issued a policy statement explaining the deduction program in which he announced his intention to impose the first 50-cent deduction, effective April 16, stating:

> [W]e have no choice but to implement the first 50-cent assessment. That is the only option Congress has given to us and it would be fiscally irresponsible to ignore a tool which will save up to $60 million per month of the taxpayers' money. For that reason, I have directed that the first 50-cent assessment be

> implemented, effective April 16. (Emphasis added).

Referring to the dairy assessment plan and the need to reduce surplus dairy production, the Secretary stated: "The Administration never liked this plan, we never supported it and knew it wouldn't solve the problem. Even on the day it passed, we predicted that Congress would be facing the issue again before too many months passed." (Emphasis in original). The Secretary concluded that the plan would not solve the problem of overproduction, and he consistently justified its implementation solely as a revenue generating vehicle.4/

4/ The Secretary refused to implement the second 50-cent deduction with its refund provisions, noting: "The second 50-cent assessment is complicated! .... If we're going to spend that much time and energy on a dairy plan, I want

FOOTNOTE CONT'D ON NEXT PAGE

On March 17, 1983 the Secretary published a final rule imposing the first 50-cent deduction effective April 16, 1983. 48 Fed. Reg. 11253-55.

Petitioners immediately sought supplemental preliminary relief challenging the Secretary's action because he continued to violate petitioners' administrative and constitutional rights. The district court conducted three days of hearings commencing April 12, 1983. During that hearing, Department of Agriculture officials testified and offered post hoc explanations to the existing administrative record for the action taken by the Secretary.

FOOTNOTE CONT'D FROM PREV PAGE
it to be a plan that will produce some positive and lasting results. These actions are obviously not the cure to the overall problem. They will take some pressure off the budget ...."

B. The District Court's Decision

On May 5, 1983, the district court entered a temporary restraining order pending disposition of the preliminary injunction based on the irreparable harm to dairy farmers and the substantial question of the Secretary's compliance with the Administrative Procedure Act.5/

On June 3, 1983, the district court issued a preliminary injunction restraining the Secretary from implementing the March 17 regulation imposing the 50 cent per hundredweight deduction.

The court predicated the issuance of the preliminary injunction on the strong showing of the likelihood of petitioners' success on the merits of three separate

---

5/ On May 13, 1983, the Fourth Circuit, without explanation, stayed the temporary restraining order. A. 307a.

claims:

First, the court found that the Secretary had violated the Administrative Procedure Act, 5 U.S.C. § 706(2), by failing to consider important and relevant factors prerequisite to a reasoned decision. A. 254a-285a.[6/]

Second, the court held that the Secretary had misinterpreted his statutory responsibility under the Agricultural Act, as amended, by failing to consider relevant factors mandated by the controlling legislation. A. 147a-214a.

Third, the court held that the Secretary violated the notice and comment

---

6/ The district court also held that dairy farmers would be irreparably harmed by the deduction program by being driven out of business and that the harm to dairy farmers outweighed any potential harm to the Secretary in not being able to immediately collect the revenues. A. 285a-299a.

requirements of the Administrative Procedure Act, 5 U.S.C. § 553, by failing to make available to interested persons studies and important data relating to the proposed program and by failing to meaningfully consider important and substantive comments on the proposed action. A. 214a-254a.

The court made detailed factual findings regarding those relevant factors that were not considered by the Secretary: (1) the impact of the program on dairy farmers; (2) the impact of the program on the economy; (3) changes in production that would be made by farmers in response to the deduction program; (4) the impact on the financial situation of dairy farmers and the net returns of producers; and (5) whether the proposed program would increase or decrease dairy

production. A. 270a-280a. The court specifically found that the government's witnesses admitted that the policy-makers did not even request that these relevant and important factors be assessed. A. 271a-273a.7/

C. The Decision of the Court of Appeals

The Court of Appeals vacated the preliminary injunction because it concluded that the Secretary was not required under the Administrative Procedure Act to consider factors which were not explicitly set forth in one of the amending subsections of the statute.

7/ On June 3, 1983, the district court issued the preliminary injunction and on June 13, 1983, the Court of Appeals stayed the preliminary injunction pending appeal and established an expedited briefing schedule. A. 309a. On June 27, 1983, Chief Justice Burger denied an application to this Court to vacate the stay pending appeal.

State of South Carolina ex rel. Tindal v. Block, 717 F.2d 874 (4th Cir. 1983).[8/] Thus, the appellate court held that the district court erred in concluding that the Secretary violated the Administrative Procedure Act by failing to consider the following relevant factors: (1) impact on dairy farmers; (2) the impact on the economy dependent on dairy farmers; (3) the regional impact on the dairy industry; and (4) the impact on milk production. 717 F.2d at 885; A. 47a-48a.

The Court of Appeals also held that the district court erred in concluding that the Secretary was required to consider relevant factors explicitly set forth

---

8/ The Court of Appeals also held that the Secretary had complied with the notice and comment procedures required by the Administrative Procedure Act. 717 F.2d at 885-86; A. 52a.

in various provisions of the Agricultural Act, as amended, and that it was sufficient if the Secretary considered only those "factors" that were set forth in that portion of the amendment that authorized the dairy deduction program. Thus, the appellate court concluded that the Secretary was not required to consider those factors set forth in subsection 201(c) of the Act, 7 U.S.C. § 1446(c): (1) assure an adequate supply of pure and wholesome milk to meet current needs; (2) reflect changes in the cost of production; and (3) assure a level of farm income adequate to maintain productive capacity to meet anticipated future needs.

Nor was the Secretary required to consider the policy factors set forth in Section 204, 7 U.S.C. § 1446b: (1) that

the production and use of abundant supplies of high quality milk and dairy products are essential to the health and general welfare of the Nation; (2) that a dependable domestic source of dairy products is important to the national defense; (3) that an economically sound dairy industry affects beneficially the economy as a whole; and (4) that it is the policy of Congress to stabilize the economy of dairy farmers at a level which will provide a fair return for their labor and investment to assure a stabilized annual production of adequate supplies of dairy products.

The court of appeals held that the only "factors" that the Secretary was required to consider were those set forth in subsection 201(d)(2), 7 U.S.C. § 1446(d)(2): (1) whether surplus milk

production would exceed five billion pounds; and (2) whether this deduction program would lower the government milk support costs. 717 F.2d at 882-883; A. 36a-37a.[9/] The court's interpre-

---

9/ The appellate court's opinion is inexplicably confusing on the factors that the Secretary was required to consider under subsection 201(d). At one point the decision refers to the two factors listed above. Subsequently the court indicates three factors, including whether the deduction would reduce overproduction. 717 F.2d at 884; A. 42a-45a.

The court's confusion likely stemmed from the inconsistent positions taken by the government with respect to whether the Secretary was required to consider factors articulated in subsection 201(c), 7 U.S.C. § 1446(c), and Section 204, 7 U.S.C. § 1446b. During the preliminary injunction hearing the government conceded that the Secretary was required to consider the factors in subsection 201(c) and Section 204. Statement of Stephen E. Hart, Department of Justice Attorney, Hearing Tr. at 585-86 (April 12, 1983). On appeal the government contended just the opposite, Government Brief at 23-25, and the Fourth Circuit adopted the government's appellate position which is fundamentally inconsistent with the Secretary's interpretation of the statutory framework.

tation of the Agricultural Act, as amended, is at odds with that of the Secretary of Agriculture who recognized that authority to impose the deduction was controlled by subsection 201(c), 7 U.S.C. § 1446(c), and Section 204, 7 U.S.C. § 1446b, as well as subsection 201(d), 7 U.S.C. § 1446(d). 48 Fed. Reg. at 3764 (January 27, 1983), 11253 (March 17, 1983), 24085 (May 31, 1983).10/

10/ The Fourth Circuit departed from this Court's well established policy of making final determinations only upon a complete trial record in sua sponte reaching a final disposition on the merits. Thus, the court of appeals has deprived the petitioners of their right to develop a full record on the administrative procedure, statutory and constitutional issues involved in this case, including taking the deposition of the key government witness, who was a surprise witness at the preliminary injunction hearing. Hearing Tr. at 221-24 (April 12, 1983). This ignores the proper role of appellate review in a preliminary injunction case, which does not permit disposition of the merits but

FOOTNOTE CONT'D ON NEXT PAGE

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S HOLDING THAT AN AGENCY NEED CONSIDER ONLY THOSE FACTORS SPECIFICALLY SPELLED OUT BY THE ENABLING STATUTE CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS AND AMOUNTS TO JUDICIAL REPEAL OF THE ADMINISTRATIVE PROCEDURE ACT

The Fourth Circuit's decision establishes a dangerous precedent which undermines the scope of judicial review of regulatory action under the Administrative Procedure Act and

---

FOOTNOTE CONT'D FROM PREV PAGE
simply allows the determination whether there has been an abuse of discretion. Doran v. Salem Inn, Inc., 422 U.S. 922, 931-32 (1975). For example, a complete record, with the commensurate discovery, would establish the merits of petitioners' claims that the Secretary's action was not designed to reduce production, did not accomplish that goal, and that the deduction was not a fee. National Cable Television v. U.S., 415 U.S. 336, 341-43 (1974). The Fourth Circuit's sua sponte resolution of the latter issue, without a complete record on the merits, was improper.

conflicts with the decisions of this Court and other circuits. The decision permits agencies to ignore important factors requisite to reasoned decisions in regulated areas when those factors are not specifically set forth in the enabling legislation. Under the Fourth Circuit's rationale, an administrator is free to ignore the substantive requirements of the APA, so long as he considers the "factors" contained within the four corners of the enabling legislation. This approach nullifies substantive judicial review. Therefore, this case presents important questions concerning the scope of substantive judicial review of agency rulemaking and the responsibility of agencies in promulgating regulations.

The Fourth Circuit erroneously held that the Secretary did not have to con-

sider relevant factors not explicitly mentioned in subsection 201(d)(2), 7 U.S.C. § 1446(d)(2). 717 F.2d at 884-85; A. 47a. However, under the APA, agency action can be set aside as arbitrary and capricious even where it is claimed to be in accordance with law or not in excess of statutory authority. To test whether an agency action is arbitrary or capricious a court is required to analyze the record for consideration of all relevant factors, particularly the impact on those being regulated.

In Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 420 (1971), this Court held that courts are required to conduct a "plenary review" of the administrative record and assess all factors relevant to a reasoned agency decision and not solely those

factors set forth in authorizing legislation.[11] J. DeLong, Informal Rulemaking and the Integration of Law and Policy, 65 Va. L. Rev. 257, 263-64 (1979). This Court has consistently adhered to this basic precept of judicial review of agency rulemaking.[12]

11/ Previous Fourth Circuit decisions have required such substantive judicial review. See, e.g., Appalachian Power Co. v. Environmental Protection Agency, 477 F.2d 495, 507 (4th Cir. 1973).

12/ The Fourth Circuit's reliance on Vermont Yankee Nuclear Power Co. v. NRDC, Inc., 435 U.S. 519 (1978) and Baltimore Gas & Elec. Co. v. NRDC, __ U.S. ___, 103 S. Ct. 2246 (1983), is totally misplaced because those decisions only preclude courts from adding procedural requirements not mandated by Congress. Those cases in no way limit the scope of substantive review dictated by Overton Park, supra. Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co., ___ U.S. ___, 103 S. Ct. 2856, 2870-71 (1983). The Fourth Circuit confused the issue of the scope of substantive review of agency rulemaking with the scope of review in assessing compliance with procedural requirements.

Recently, in Motor Vehicle Mfrs. Ass'n v.State Farm Mutual Automobile Ins. Co., __U.S. ___, 103 S. Ct. 2856, 2867 (1983), this Court confirmed the scope of review requirement of Overton Park, supra, and explained the arbitrary and capricious standard under Section 706(2) of the APA. This Court held that the agency had acted arbitrarily and capriciously in rescinding a rule because it failed to consider important relevant factors, albeit not explicitly mentioned in the authorizing statute. Despite the fact that the controlling statute did not require passive restraints, the agency's action was arbitrary and capricious in rescinding a regulation requiring passive restraints because it failed to consider an important relevant factor -- that an existing and effective passive restraint device (airbags) was technologically

feasible.

The Fourth Circuit's holding cannot be squared with Overton Park and Motor Vehicle Mfrs. Ass'n., supra. Those cases do not permit an agency to ignore important relevant factors requisite to a reasoned decision because those factors are not explicitly articulated in the enabling legislation. This is especially so, where, as here, these relevant factors all relate to the impact of the regulatory action on those being regulated and to the underlying legislative purpose itself. Under the Fourth Circuit's rationale the agency is permitted to ignore: (1) the impact on dairy farmers; (2) the impact on the economy dependent upon dairy farmers; (3) the regional impact on the dairy industry; and (4) the impact on milk production,

i.e. whether the assessment would really cause milk production to decline. 717 F.2d at 885; A. 47a-48a.

The Secretary's failure to consider these relevant factors leads inescapably to the conclusion that the decision to implement the deduction was arbitrary and capricious. It was arbitrary and capricious because the deduction was implemented without any firm understanding: (1) of the number of dairy producers who would be driven out of business;[13/]

13/ Several months after the deduction program went into effect, the Secretary, for the first time, in a new rulemaking proceeding, stated that each 50-cent per hundredweight incremental deduction will result in an additional "1600 fewer operations" with milk cows in fiscal 1984. 48 Fed. Reg. at 24087 (May 31, 1983). However, no consideration of this factor was made prior to the implementation of the deduction program at issue here. Indeed, the Secretary's staff had claimed that such an analysis was not possible. (The three page

FOOTNOTE CONT'D ON NEXT PAGE

and (2) whether its implementation could achieve any positive effect in reducing overproduction.14/ In short, the Secretary acted without any factual analysis, and therefore no factual support, for concluding that the deduction program would achieve any purpose other than to

---

FOOTNOTE CONT'D FROM PREV PAGE.
summary of comments provided to the Secretary (discussed at pages 10-11, supra) notes that such an analysis was "neither possible nor necessary").

14/ The administrative record established that the deduction program would not decrease production. Indeed, the comments on the proposed deduction program were unanimous in criticizing the proposal precisely because it would have the effect of increasing production. The Fourth Circuit, however, adopted the post hoc rationalization urged by the government that the Secretary had determined that the deduction would reduce overproduction. This post hoc rationalization came in the form of government testimony offered to explain an unsupported and conclusory assertion in 48 Fed. Reg. 3765. 717 F.2d at 884; A. 45a-46a. Several months after the program was initiated, the Secretary acknowledged that there was indeed an increase in milk production. 48 Fed. Reg. 24086.

generate revenues. The latter factor was the sole predicate for the Secretary's action. The Fourth Circuit's analysis, if left standing, permits this myopic approach to rulemaking and sanctions agency action which ignores any consideration of the impact on those being regulated, and any rational nexus between the regulatory action and fulfillment of the legislative goal.15/

15/The Fourth Circuit's approach permitted the Secretary to ignore the impact of the Payment-In-Kind ("PIK") program which was implemented almost simultaneously with the deduction program. This program idled over 40 million acres of wheat, corn and sorghum and combined with drought conditions caused a rapid and substantial increase in feed grain prices, which had a dramatic effect on the costs of dairy farmers. This made the effect of the deduction program even more dramatic because it placed dairy farmers in a cost-price squeeze. Yet, the Secretary, ignoring any consideration of the PIK program, noted in the Final Determination to implement the deduction that feed

FOOTNOTE CONT'D ON NEXT PAGE

At a minimum, a regulatory agency is required to analyze the effect of its action on those being regulated irrespective of whether this consideration is specifically articulated by statute. It is required under the basic precepts of the Administrative Procedure Act as interpreted by the case law. Pennzoil Co. v. Federal Power Comm., 534 F.2d 627, 631-32 (5th Cir. 1976); McCulloch Gas Processing Corp. v. Department of Energy, 650 F. 2d 1216, 1227-28 (T.E.Ct.App. 1981).

Recognizing the harsh impact of the Secretary's action in driving dairy farmers out of business, the court noted that "[w]ere we the Secretary we might well have searched long for a more humane

---

FOOTNOTE CONT'D FROM PREV PAGE.
prices for the dairy farmers would remain low. 48 Fed. Reg. 11254.

alternative." 717 F.2d at 888; A. 65a. This conclusion reflects the courts' erroneous interpretation of the scope of review under the Administrative Procedure Act. Indeed, the court's conclusion is fundamentally at odds with the Congressional mandate of the Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 601 et seq.

Under the RFA, 5 U.S.C. § 603-04, the government is required to consider, inter alia, the potential costs of the rule, any adverse effects which could not be quantified in monetary terms, the identification of those likely to bear the costs, and the potential benefits of the rule, including alternative approaches that could substantially achieve the same regulatory goal and "minimize any significant economic impact

of the rule on small entities." Id. The Act is particularly concerned with the economic impact of agency action on "small entities" of limited means, such as dairy farmers and the small businesses in the rural economy that depend upon dairy farmers. S. Rep. No. 96-878, 96th Cong., 2d Sess. 9 (1980).

In Small Refiner Lead Phase-Down Task Force v. United States Enviromental Protection Agency, 705 F.2d 506, 537-39 (D.C. Cir. 1983), the Court of Appeals for the District of Columbia Circuit held, based upon an extensive review of the legislative history, that the RFA requires the reviewing court to consider the impact factors set forth in the Act as part of its "overall judgment whether a rule is reasonable."

By ignoring the Regulatory Flexibil-

ity Act, the Fourth Circuit has allowed the Secretary of Agriculture to impose the deduction irrespective of the impact on small businesses, thus nullifying the purpose of the RFA. This error is particularly egregious because: (1) the Secretary himself has concluded that over 95% of all dairy farmers fall within the category of small business entities, 48 Fed. Reg. 3786; and (2) net returns per hundredweight to all dairy farmers have been reduced by 82%. By disregarding these factors as well as the other relevant factors, the Secretary closed the door to considering other reasonable and less burdensome alternatives. The Fourth Circuit's decision sanctions this narrow and unprecedented approach.

Nothing in the legislative history

of the authorizing legislation even remotely suggests that Congress intended that the Secretary could ignore the requirements of the Administrative Procedure Act or the Regulatory Flexibility Act. Moreover, nothing in the dairy price support statute or its legislative history supports the conclusion that Congress intended the Secretary to impose the deductions without analyzing the impact on dairy farmers. Indeed, the very legislative history relied upon by the court of appeals indicates that Congress intended to provide an incentive "to reduce production without forcing thousands of existing producers out of business." H. Rep. No. 97-687, 97th Cong., 2d Sess. 11 (1982); 717 F.2d at 878 n.9; A 11a.

The record established that the

Secretary's action would not decrease production and that it would drive dairy farmers out of business. (March 16, 1983 Dairy Policy Statement of Agriculture Secretary John R. Block at 1, 4, 7-8; 48 Fed. Reg. at 11255; April 14, 1983 Statement by Richard E. Lyng, Deputy Secretary of Agriculture Before the United States Senate Committee on Agriculture; Testimony of William E. Coble, Hearing Tr. at 67-68 (April 12, 1983); Testimony of Charles Shaw, Leader, Dairy/ Sweetners Group of the Analysis Division of the Agricultural Stabilization and Conservation Service, USDA, Hearing Tr. at 292-93 (April 12, 1983)). Despite this record, the Fourth Circuit limited its review to whether the Secretary had considered the narrow factors set forth in subsection 201(d)(2), 7 U.S.C.

§ 1446(d)(2). Thus, the Fourth Circuit restricted its "review" to a consideration of whether the Secretary had properly computed that the projected overproduction would exceed 5 billion pounds and whether the deduction would lower government milk support costs. 717 F.2d at 883; A. 39a. The Fourth Circuit's conclusion that the Secretary might well have searched for a more humane alternative is no substitute for its failure to undertake the substantive review required by the APA, as given definition by the RFA, and, therefore, its decision is at odds with the precedents of this Court and other circuits.

II. THE FOURTH CIRCUIT'S HOLDING FRUSTRATES THE LONGSTANDING CONGRESSIONAL POLICIES AND INTENT UNDERLYING THE DAIRY PRICE SUPPORT LEGISLATION

The court of appeals' decision isolates the deduction provision of subsection 201(d)(2), (7 U.S.C. §1446(d)(2)), from the fundamental provisions of dairy price support legislation. The court held that Congress intended the deduction provisions to be a "self-contained temporary change in the dairy support program" and that, therefore, the Secretary was free to disregard long-established statutory policies and factors which he is required to consider when making dairy price support decisions, such as: fair returns to producers for labor and investment (7 U.S.C. §1446b); costs of production (§1446(c)); the assurance of an adequate supply of milk to meet current needs (§1446(c)); and the assurance of a level of farm income adequate to maintain production capacity to meet

anticipated future needs (§1446(c)). 717 F.2d at 882; A. 35a-36a. This is a case of first impression with far-reaching implications for the proper administration and implementation of an integral part of the dairy price support program. If allowed to stand, the Fourth Circuit's decision confers upon the Secretary unfettered discretion in the implementation of this and any future deduction program.

The holding not only gives unwarranted and exaggerated importance to the deduction provision of subsection 201(d)(2) (7 U.S.C. §1446(d)(2)), but also sets that provision apart from the fundamental policies and factors retained in Section 204 (7 U.S.C. §1446b) and those factors specifically and simultaneously reenacted by Congress in subsection 201(c) (7 U.S.C. §1446(c)) of the dairy

price support legislation. This interpretation by the court below directly violates the established principle that, absent a clear Congressional intent to the contrary, statutory provisions must be harmonized and read as a whole. Radzanower v. Touche Ross & Co., 426 U.S. 148, 155 (1976); Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973). It is not enough that statutory provisions may arguably conflict -- there must be positive repugnance. United States v. Welden, 377 U.S. 95, 102-103 n.12 (1964); United States v. Borden, 308 U.S. 188, 198-199 (1939).

In this case there is no Congressional intent that the Secretary, in considering implementation of his discretionary authority, was to ignore the long established policies and factors of the

milk price support statutes. To the contrary, the very reenactment by Congress of the policies and factors set forth in subsection 201(c) and the retention of those policies and factors set forth in Section 204 establish that Congress intended the Secretary to exercise his discretionary deduction authority consistent with those long-established provisions.

Moreover, the Fourth Circuit's contrary interpretation is fundamentally at odds with the consistent interpretation of the Secretary of Agriculture of his statutory authority and responsibility.16/ The Secretary has

---

16/ An administrator's interpretation of his statutory authority is entitled to great deference. See, e.g., FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 37 (1981); Udall v. Tallman, 380 U.S. 1, 16 (1965).
FOOTNOTE CONT'D ON NEXT PAGE

repeatedly interpreted his authority to impose the deduction as a dairy price support determination authorized by subsections 201(c) and (d) and Section 204. In each Federal Register notice in this proceeding, including the notice of January 27, 1983, the Secretary cited as his authority for implementing the deduction program, the provisions of subsections 201(c) and (d) and Section 204. 48 Fed. Reg. at 3764 (January 27, 1983), 11253 (March 17, 1983), 24085 (May 31, 1983).

Further, the record is replete with

FOOTNOTE CONT'D FROM PREV PAGE.
Nowhere does the Fourth Circuit provide a predicate for its rejection of the Secretary's interpretation of his statutory authority. Nor does the Fourth Circuit cite "any obvious congressional intent" which was inconsistent with the Secretary's interpretation. Espinoza v. Farah Manufacturing Co., 414 U.S. 86, 94-95 (1974).

concessions by the Secretary that his discretionary determination to impose the deduction program was an integral part of the price support determination established under subsection 201(c) (§1446(c)). The deductions are consistently described by respondent's witnesses and counsel as a fundamental part of the dairy price support program; e.g.:

> "What the $.50 deduction really is is a $.50 deduction from the price support level. If you look at the statute itself, I think that is made crystal clear ... that the $.50 is not really a deduction or a tax in isolation from everything else. It is a deduction from what the farmer otherwise would get, and would get only because of the support price -- the price support program."

Statement of J. Paul McGrath, Assistant

U.S. Attorney General, Hearing Tr. at 352-53 (January 4, 1983). See also Affidavit of Charles Shaw, Leader, Dairy/Sweetners Group, of the Analysis Division of the Agricultural Stabilization and Conservation Service, USDA, at 3; Testimony of Dawson Ahalt, Hearing Tr. at 394 (April 12, 1983).

Subsection 201(c) declares that the price of milk shall be supported at a level between 75% and 90% of parity and requires the Secretary to determine that such level assures "an adequate supply of milk to meet current needs, reflect changes in cost of production and assure a level of farm income adequate to maintain production capacity sufficient to meet anticipated further needs." Subsections 201(d)(1)(A) and (B) simply provide a price support floor which deviates from

the minimum 75% floor established in subsection 201(c).17/ Similarly, the deductions authorized by subsections 201(d)(2) and (3) are no more than permission to further deviate from the 75% floor.

Therefore, the "notwithstanding any other provision of law" language which precedes all these subsections was merely intended to authorize these deviations from the price support parity floor of 75% as set forth in subsection 201(c). Nowhere does it evince a Congressional intent to repeal the operation of the provisions of subsection 201(c) with

---

17/ The $13.10 support price represents about 68% of parity. 128 Cong. Rec. S.9891, (daily ed. August 5, 1982) (Statement of Sen. Cochran) 97th Cong., 2d Sess.

Subsection 201(d)(1)(C) does no more than restate the requirement of 201(c) that the price of milk shall be supported through the purchase of milk and milk products.

respect to the policies and factors the Secretary must consider in any dairy price support determination. If Congress intended to repeal or temporarily suspend the requirement to consider those factors, it would have done so in clear and unambiguous terms by not reenacting subsection 201(c) or utilizing language that its operation was temporarily suspended.18/ The reason the Fourth

---

18/ Taking the Fourth Circuit's interpretation to its logical conclusion leads to the untenable result that "notwithstanding any other provision of law" temporarily suspends the operation of all laws, not only the price support statutes, the APA and the RFA.

There is no legislative history that Congress intended that this narrow provision nullify the policies and factors set forth in subsection 201(c). Radzanower v. Touche Ross & Co., supra. There is no conflict in requiring the Secretary to consider relevant factors in imposing the deduction. On the other hand, there is a conflict between the established floor of 75% of parity and imposing the deduction. Thus, the "notwithstanding any other

FOOTNOTE CONT'D ON NEXT PAGE

Circuit misinterpreted this provision was its erroneous conclusion that the authorized deductions were separate and distinct from the dairy price support program. This conclusion is refuted by the structure of the amendment to Section 201 of the Agricultural Act of 1949, which is entitled "Dairy Price Support Program."

Moreover, although Congress provided for a deduction program, it clearly did not require that program to be imposed. Congress gave the Secretary discretionary authority only, after he concluded that CCC purchases would exceed 5 billion pounds of milk equivalent.19/ The

---

FOOTNOTE CONT'D FROM PREV PAGE.
provision of law" proviso only becomes operative where the conflict appears.

19/ The same conditional and discretionary grant is given to the Secretary under subsection 201(d)(3)(A) with the further condition that a refund program be established.

use of the word "may" in both of these sections is directly contrasted against the explicit "shall" language of the preceding subsection 201(c). Therefore, Congress clearly granted the Secretary discretionary authority whether to impose the deductions; provided, however, that he exercise that discretion by giving full and careful consideration to the policies and factors set forth in subsection 201(c). Indeed, it is clear that Congress intended that the Secretary exercise his discretionary authority in conformity with subsection 201(c) and in harmony with the overall milk support statutes within which that authority rests. Barlow v. Collins, 397 U.S. 159, 167 (1970).

The court below erroneously held that the Secretary, prior to imposing the

deduction, need only consider the cost of the milk price support program and the amount of CCC purchases. 717 F.2d at 883; A. 37a. It is clear, however, that the amount of CCC purchases is merely a trigger mechanism, which confers upon the Secretary the power to decide whether to impose the deduction, after a full consideration of the other factors set forth in the overall dairy legislation. The Fourth Circuit's decision constitutes a repeal of the preceding statutory sections as they relate to establishing the criteria for the Secretary's exercise of discretion in implementing the deduction program. Such a result was clearly unintended by Congress, and courts should avoid such construction of a statute that renders similar and pertinent provisions meaningless and superfluous. Weinberger

v. Hynson, Westcott & Dunning, Inc., supra; United States v. Menasche, 348 U.S. 528, 538-39 (1955).

Further, by its holding, the court of appeals gives the Secretary a standardless delegation of power and reduces the scope of review by an examining court to a mere cursory examination of a mathematical conclusion by the Secretary that CCC purchases amount to 5 billion pounds. In effect, the holding allows the Secretary to impose the deductions as he deems fit.

In sum, the Fourth Circuit's erroneous statutory interpretation subverts the overall dairy price support legislation and its Congressional intent. Moreover, the court of appeals clearly misinterpreted the statutory language which provided the triggering mechanism

for authorizing the deduction program and substituted these mere triggering mechanisms for the policies and factors established by Congress as the definition for the exercise of the Secretary's discretion. If left standing the Fourth Circuit's holding has granted the Secretary unfettered discretion in implementing the instant deduction program and any future deduction programs.

CONCLUSION

There is a compelling need to decide the far-reaching questions of the discretionary authority of the Secretary of Agriculture to impose a multi-million dollar deduction program in disregard of the relevant considerations of impact required by the APA, as given definition by the RFA, and long-established price support legislation. The

Fourth Circuit's decision amounts to judicial repeal of the APA, as well as the dairy price support statute in the implementation of this and future deduction programs.

Respectfully submitted,

DONALD M. BARNES
COUNSEL OF RECORD
SALVATORE A. ROMANO
JOYCE L. BARTOO

ARENT, FOX, KINTNER PLOTKIN & KAHN
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 857-6000

Counsel for Petitioner Associated Milk Producers, Inc.

D. PAUL ALAGIA, JR.
RICHARD A. GLADSTONE
COUNSEL OF RECORD
SYDNEY J. BUTLER

BARNETT & ALAGIA
1000 Thomas Jefferson St., N.W.
Washington D.C. 20007
(202) 342-0342

Counsel for Petitioners Suncoast Milk Producers Cooperative, Inc. et. al.

T. TRAVIS MEDLOCK
Attorney General
CLIFFORD O. KOON, JR.
Assistant Attorney General
JOSEPH A. WILSON II
Chief Deputy Attorney General
COUNSEL OF RECORD
State of South Carolina
Rembert Dennis Bldg., Rm. 642
1000 Assembly St.
Columbia, South Carolina 29211
(903) 758-2072

RAYMON E.
LARK, JR.
Assistant
Consumer Advocate
COUNSEL OF RECORD
2801 Divine St.
P.O. Box 5757
Columbia, S.C.
29205
(803) 758-5011

Counsel for
Petitioner South
Carolina
Department of
Consumer Affairs

RUSSELL W. TEMPLETON
COUNSEL OF RECORD
1 Monckton Blvd.
Columbia, S.C. 29206
(803) 782-0235

Counsel for Petitioners South
Carolina
Farm Bureau
and Frank Flowers,
W. Charles McGinnis
and Lawrence
Weathers